

IP 05-0516-C h/k Sons v. Henry County [2]
Judge David F. Hamilton

Signed on 03/13/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PENNY SONS,)	
)	
Plaintiff,)	
vs.)	NO. 1:05-cv-00516-DFH-TAB
)	
HENRY COUNTY,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PENNY SONS,)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 1:05-cv-0516-DFH-TAB
)	
HENRY COUNTY,)	
)	
Defendant.)	

ENTRY ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Penny Sons was a 911 telecommunications officer and supervisor for the Henry County Sheriff's Department from October 1991 until her resignation in January 2004. She submitted her resignation after she tested positive for illegal drug use, lied to her supervisors, and was caught falsely altering a prescription she submitted to excuse the drug use.

Following her resignation, Sons filed this lawsuit under 42 U.S.C. § 1983 claiming Henry County violated her rights under the Fourteenth Amendment of the United States Constitution by constructively discharging her. Sons also alleged that Henry County violated her rights under the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601 *et seq.*, when it twice denied her requests for leave that she would have used to deal with her substance abuse problem.

In a previous entry on defendant's motion for summary judgment, the court granted summary judgment in favor of Henry County on Sons' § 1983 claims. *Sons v. Henry County*, 2006 WL 3135150 (S.D. Ind. Oct. 31, 2006). The court also ordered Sons to show cause why her FMLA claim should not be subject to summary judgment in favor of Henry County on the ground that its alleged violations of the FMLA could not have caused her any injury compensable under the FMLA. Sons responded, and Henry County replied. For reasons explained below, summary judgment is granted in favor of Henry County on this remaining claim.

Facts for Summary Judgment

The court will not repeat all of the undisputed facts stated in the previous entry. The following is a brief review of the undisputed facts relevant to Sons' FMLA claim.

Sons began working as a telecommunications officer for Henry County in October 1991. The trouble began on December 16, 2003, when Sons learned that she was scheduled to take a drug test two days later. Sons had taken a diet pill called Didrex for about a week prior to the test. Though she originally obtained Didrex legally, the prescription had long since expired. Sons had also been taking Adderall for one or two months before the scheduled drug test. The drug had been prescribed and intended for use by her son.

On the way to her drug test, Sons realized she would test positive and decided to admit her drug use to supervisors Butch Baker and Scott Pinkerton. Before her urine sample was taken, she had a meeting with Baker and Pinkerton and admitted using Adderall and Prozac.¹ At some point during this meeting, Sons claims she asked her supervisors “if there was any way I could file for Family Medical Leave Act, not go on [with the drug test] to try to get myself taken care of.” Sons Dep. 132. Her supervisors allegedly said she “couldn’t do that before [she] took a urine test.” *Id.* at 133. Eventually, she took the drug test.

In late December 2003, Sons learned the test returned a positive result for methamphetamine, possibly caused by her use of Didrex. In order to excuse her use of the drug, she altered her Didrex prescription by changing the date from “1999” to “2002.” When confronted about the forged prescription, she initially lied and said she did not falsify the document. Eventually she admitted the forgery.

On January 3rd or 4th, Sons called Sheriff Cronk and once again asked for FMLA leave on advice of her doctor. According to Sons, she told Sheriff Cronk that she was seeing a doctor and would need FMLA leave in order to finish her rehabilitation process. Sons Dep. 134. She testified that Sheriff Cronk told her “it couldn’t be done.” *Id.*

¹Sons apparently had a valid prescription for Didrex at the time of the test. She did not believe that the Didrex would result in a positive test.

After learning that Baker was investigating her failed drug test, forged prescription, and false statements to superiors, Sons submitted her resignation letter on January 6, 2004.

Discussion

When Congress enacted the FMLA, it provided a specific set of remedies for plaintiffs. Those remedies include “any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation.” 29 U.S.C. § 2617(a)(1)(A)(i)(I). An employee can also recover “any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee.” 29 U.S.C. § 2617(a)(1)(A)(i)(II). Finally, an employee may obtain “such equitable relief as may be appropriate, including employment, reinstatement, and promotion.” 29 U.S.C. § 2617(a)(1)(B). Other kinds of damages, including punitive damages, nominal damages, or damages for emotional distress, are not recoverable under the FMLA. See *Coleman v. Potomac Elec. Power Co.*, 281 F. Supp. 2d 250, 254 (D.D.C. 2003), citing *Walker v. United Parcel Service, Inc.*, 240 F.3d 1268, 1277 (10th Cir. 2001); *Settle v. S.W. Rodgers Co., Inc.*, 998 F. Supp. 657, 665-66 (E.D. Va. 1998); *Keene v. Rinaldi*, 127 F. Supp. 2d 770, 772-73 & n.1 (M.D.N.C. 2000).

The sole remaining issue on summary judgment is whether an employer is entitled to summary judgment when the plaintiff cannot show she is entitled to any of these damages or equitable relief as a result of an alleged FMLA violation.

With a full opportunity to brief the issue, Sons concedes that she suffered no damages because of Henry County's alleged FMLA violations. She acknowledges that equitable relief is inappropriate given the undisputed facts of the case. Nevertheless, she argues that she should have the opportunity at trial to obtain declaratory judgment against Henry County determining that the county violated the FMLA by denying her requests for leave.

The Seventh Circuit settled this issue in *Harrell v. United States Postal Service*, 445 F.3d 913 (7th Cir. 2006). The plaintiff (Harrell) was a postal clerk who took FMLA leave to deal with a variety of ailments. Because he failed to provide medical documentation sufficiently outlining the nature of his ailments, Harrell's supervisor did not allow him to return to work. A postal nurse asked Harrell if she could contact his physician to obtain the necessary information. He expressly stated he did not want her to do so. After the postal nurse faxed a return-to-work form to Harrell's physician anyway, the physician refused to release any information.

The district court found that the Postal Service had violated the FMLA by contacting Harrell's personal physician without his consent.² Despite the violation, the district court granted summary judgment for the Postal Service on Harrell's claim because he suffered no compensable injury. The Seventh Circuit upheld summary judgment on appeal, noting:

Section 2617 affords no relief unless the employee has been prejudiced by the violation: The employer is liable only for compensation and benefits lost "by reason of the violation," § 2617(a)(1)(A)(i)(I), for other monetary losses sustained "as a direct result of the violation," § 2617(a)(1)(A)(i)(II), and for "appropriate" equitable relief.

445 F.3d at 928-29. The court found no indication that any information obtained from the postal nurse's contact with the physician in any way compromised Harrell's return-to-work status or was a factor in the Postal Service's decision to terminate his employment. The Seventh Circuit concluded: "Because Mr. Harrell was not harmed by the unauthorized contact with his physician, § 2617 provides him no remedy, including equitable relief, and the district court correctly granted the Postal Service summary judgment on this claim." *Id.* at 929.

Harrell is consistent with several other decisions that have granted summary judgment in favor of an employer when its technical violation of the

²FMLA regulations provide: "If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employer's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, *with the employee's permission*, for purposes of clarification and authenticity of the medical certification." 29 C.F.R. § 825.307(a) (emphasis added).

FMLA did not cause a remediable harm. See *Coleman v. Potomac Elec. Power Co.*, 281 F. Supp. 2d 250, 254 (D.D.C. 2003) (“Recovery under FMLA is unambiguously limited to actual monetary damages”); *Lapham v. Vanguard Cellular Sys.*, 102 F. Supp. 2d 266, 270 (M.D. Pa. 2000) (granting summary judgment when an FMLA plaintiff could claim only attorney fees if an FMLA violation were found: “we doubt the propriety of allowing an action to proceed where the only relief sought is an award of attorney’s fees”); *Dawson v. Leewood Nursing Home*, 14 F. Supp. 2d 828, 832 (E.D. Va. 1998) (“once it becomes clear that a plaintiff can recover nothing but a symbolic victory in that the defendant violated a statute, the lawsuit should be terminated”); *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 17 F. Supp. 2d 271, 275 (S.D.N.Y. 1998) (an employee who received the benefits of FMLA and was not entitled to damages could not maintain an FMLA action against his employer, even though the employer may have failed to give the plaintiff proper information about his FMLA rights).

As in *Harrell*, there is no basis for finding that Henry County’s alleged FMLA violation harmed Sons in any way remediable by that statute. After being denied leave, Sons remained on the job and was presumably paid for her time. She does not allege incurring any additional expenses as a direct result of being denied leave. Nor does she claim her attempts to exercise her FMLA rights caused her to lose her job. The Seventh Circuit was clear in *Harrell*: to pursue her FMLA claim at trial, Sons must allege something more than just a technical violation of the FMLA. She must come forward with some evidence that she suffered a harm that

can be remedied by the statute. Because she cannot do so, Henry County is entitled to summary judgment on the FMLA claim.

Henry County's motion for summary judgment is therefore granted on Sons' FMLA claim. Because Henry County was granted summary judgment on all other claims, the court will enter final judgment accordingly.

So ordered.

Date: March 13, 2007

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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